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LSE Law, Society and Economy Working Papers 13/2022
London School of Economics and Political Science
Law School

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Electronic copy available at: https://ssrn.com/abstract=4283813

The Authoritarian Nature of Common Good Constitutionalism

Michael Wilkinson*

Abstract: How are we to evaluate the project of common good constitutionalism? This new movement, which dismisses positivism and liberalism, progressivism and originalism, aims to overturn the entire canon of modern political and constitutional theory. In its place, it aims to restore a classical tradition of natural law, which is said to have been lost over the last century of constitutional law and practice. But it aims to do so using one of liberalism's own juristic heroes, Ronald Dworkin, in order to free conservatism from the tethers of fidelity to constitutional text. Although intellectually confused, the real purpose of common good constitutionalism is to make an intervention into the constitutional culture wars of the present. In so doing it lends itself to highly authoritarian readings, not because of its opposition to liberalism, but because of its steadfast refusal of any link between constitutional authority and democracy.

Keywords: Authoritarianism, Conservatism, Common Good Constitutionalism, Natural Law, Democracy

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INTRODUCTION

In Giorgio Agamben's remarkable formulation, Carl Schmitt had argued 'without reservation' for the 'involvement of the jurist in the material constitution of [his] times'.[1] Schmitt's involvement as jurist, theorist and conservative political commentator through the various stages of the Weimar Republic, into the period of National Socialist takeover, and then in the era of postwar reconstruction under the aegis of a new global order of inter-imperial rivalry, has been well documented.[2] But Schmitt had also perceived himself to be the 'final representative' of an older order, of the *jus publicum Europaeum*, which was coming to an end after the First World War in a sea of concrete disorder and lawlessness. It was, above all, the collapse of authority that Schmitt feared in the interwar conjuncture. And it was a fate, he was convinced, which – due to the ascendence of legal positivism in the academy and technical liberalism in political practice – the prevailing order was impotent to defend against. Schmitt turned to progressively authoritarian, and then ultimately dictatorial solutions, in an attempt to arrest this disorder and decline, leaving behind a legacy that is notoriously ambiguous.

The high point of jurisprudential positivism and liberalism had arguably been reached with the publication of Hans Kelsen's *Pure Theory of Law* in the 1920's. But Kelsen's work, unlike Schmitt's, had little bearing on the political and constitutional fate of the Weimar Republic. If it is doubtful that legal positivism as a jurisprudential tradition had *any* significant impact on the interwar collapse, warnings about the political weakness and constitutional fragility of legislative positivism and parliamentary sovereignty appear to have been heeded in the postwar era. In continental Europe, at least, and certainly in Germany, Europe's most significant juridical centre of power, the association of positivism with Weimar's collapse, however misguided, meant that positivism was tainted after the Second World War, perhaps irredeemably.[3] In a complex symbiosis between the work of German émigrés such as Karl Lowenstein, and later American scholars such as Ronald Dworkin, constitutional theory embraced the moralism that positivists such as Kelsen had tried to eradicate from jurisprudential enquiry.[4] In the specific sense of influencing a strain of anti-positivism in postwar juristic discourse, Schmitt's

[1] Giorgio Agamben, 'A Jurist Confronting Himself', in Meierhenrich and Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP, 2017) 458.

[2] For a comprehensive treatment of Schmitt's various twists and turns, see Jens Meierhenrich, 'Fearing the Disordering of Things: The Development of Carl Schmitt's Institutional Theory, 1919–1942' in Meierhenrich and Simons, above, ch 6.

[3] Stephan Kirste, 'The German Tradition of Legal Positivism' in *The Cambridge Companion to Legal Positivism* (CUP 2021) 105 – 132.

[4] See Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton University Press, 2014). According to Greenberg this was underpinned by the shared anti-communism of postwar liberals in Europe and the US. In jurisprudence, the turn away from positivism is encapsulated in Radbruch's 'conversion' (as H. L. A. Hart put it) to natural law (cf. Stanley Paulson, 'On the Background and Significance of Gustav Rabruch's Post-War Papers' (2006) 26:1 *Oxford Journal of Legal Studies* 17 – 40).

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influence was thus profound, and would live on in doctrines of 'constitutional identity', even though these are now more often associated with liberal constitutionalism than with Schmitt's political jurisprudence.[5]

Schmitt's warnings about the technical turn in liberal politics and public law appear to have resonated rather less, however. The category of 'the political' has largely been substituted by behaviouralist, empiricist and systems-theoretical analyses in political science, and moralistic, normative discourses in public law.[6] This erosion of a specifically political discourse is a phenomenon that has touched both sides of the Atlantic, as Sheldon Wolin documented in the context of US constitutionalism.[7] In more recent decades, the dominance of a technical mindset in constitutional theory has been strongly reinforced by European and international developments, uniting various positions of 'post-sovereignty' and 'post-democracy'.[8] This has in turn led to various responses and reactions, often now labelled under the broad heading of 'populism'.[9]

Adrian Vermeule's *Common Good Constitutionalism* presents itself as another such reaction against liberal constitutional hegemony, albeit with the important difference of appealing not to popular will but to a much older tradition of reason, rooted in classical natural law.[10] He declares that North American public law remains in the sway of liberalism and positivism and laments that the ascendance of these traditions over the last century has led the nation into a deep impasse. Vermeule's proposed remedy is, in one sense at least, far simpler than Schmitt's: a revival of Catholic doctrine based on a conception of the Common Good and the teachings of St Thomas Aquinas. Through this revival, conservatism can detach itself from an unfortunate association with 'originalism', a predominant theory of constitutional interpretation in the US that, in Vermeule's view, hardly differs from positivism. In conjunction with the classical tradition, common good constitutionalism can expose the illusions of originalism and positivism and at the same time offer a profound corrective to liberal progressivism and its short-sighted obsession with individual autonomy.

Vermeule pays little attention to the other side of Schmitt's critique of liberalism and positivism, its neglect of the category of 'the political'; there is in fact nothing on constitutional politics in *Common Good Constitutionalism*, the book instead

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[5] On the continuity between interwar conservative jurisprudence and the constitutionalism of the Bonn Republic, see Clara Maier, 'The Weimar Origins of the West German *Rechtsstaat*, 1919 – 1969' (2019) 62:4 *The Historical Journal* 1069. For an historical examination of the doctrine of constitutional identity, see Monika Polzin, 'Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law' (2015) 14:2 *International Journal of Constitutional Law* 411.

[6] For an important exception, see Martin Loughlin, *Political Jurisprudence* (OUP, 2017).

[7] Sheldon Wolin, 'Fugitive Democracy' (1994) 1:1 *Constellations* 11.

[8] See Michael A Wilkinson, 'Beyond the "post-sovereign" state: on the past, present and future of constitutional pluralism' (2019) 21 *Cambridge Yearbook of European Legal Studies* 6.

[9] See recently Mark Tushnet and Bojan Bugaric, *Power to the People: Constitutionalism in the Age of Populism* (OUP, 2022). For a survey article, see Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39:2 *Oxford Journal of Legal Studies* 435.

[10] Adrian Vermeule, *Common Good Constitutionalism* (Polity, 2021), henceforth 'CGC'.

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focuses almost entirely on re-moralising constitutional theory and utilising juridical rather than political means to achieve its conservative ends. There is, however, a twist in the tale. Vermeule appeals to a liberal jurist, perhaps *the* liberal jurist of the postwar era, at least in the Anglo-American world, to help map the path to the promised land. Ronald Dworkin's work is not analysed in any depth in the book, but it plays a pivotal role.[11] It does so by offering a jurisprudential method for avoiding positivist reductionism and adherence to the legal text. By advancing a conception of law and legal adjudication as an exercise in moral interpretation, Dworkin helps to unshackle constitutionalism from all manner of positivist, originalist and liberal vices.

While retaining Dworkin's methodological programme of 'law as interpretation', Vermeule inverts his conclusions. Constitutional law is to be put back on the right track by substituting the classical tradition of natural law for Dworkin's own liberal theory of 'rights as trumps'. All that is required is for the last few chapters of the juridical 'chain-novel' – Dworkin's metaphor for the way judicial precedent systematically develops – to be scratched out and rewritten and for law to be reintegrated with the canon of classical jurisprudence.[12] This offers the 'best fit and justification' for the American legal tradition and its juristic development (the past century aside). Constitutional law can then be returned to its rightful place, the common good restored and the liberal decline of the last decades arrested.

What kind of a project is this? Who is to advance it? How is it to be pursued? It is clear that Vermeule is engaged in more than a scholarly exercise. The reference to Dworkin implies this is a task for a Herculean judge, no less. But as well as rejecting Dworkin's substantive commitment to liberty and equality, Vermeule rejects Dworkin's appeal to the bench for salvation: this is 'Dworkin plus deference'. Nor, however, is there any faith in the legislative branch to put things back on track. Common good constitutionalism is emphatically not a project of democratic renewal. Neither is it a constitutional programme in the sense of advocating amendment or fundamental constitutional change sanctioned by the constitution-making power. Are we left with the hope for a strong authoritarian leader to restore rightful order, for an executive-led project, as Schmitt himself eventually turned to? Or will Vermeule's professed faith in law's 'real nature' reasserting itself suffice to put things right?[13]

Vermeule's defenders have vehemently rejected the notion that the project is inherently authoritarian.[14] But it is not hard to see why its detractors have

[11] In the views of some critics, by providing a cover or smokescreen for highly illiberal designs. See David Dyzenhaus, *The Snake Charmers, VerfBlog,* 2022/3/07, available here: https://verfassungsblog.de/os5-snake-charmers/, DOI: 10.17176/20220308-001230-0 (last accessed 16 October 2022).
[12] The novel is partly to be ripped up, partly reinterpreted in drastic terms (CGC, p 181).
[13] CGC, 184.
[14] Connor Casey, "'Common-Good Constitutionalism" and the New Battle Over Constitutional Interpretation in the United States' (2021) 4 *Public Law* 765.

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characterised it in that way and highlighted its debt to Schmitt.[15] The book, taken at face value, appears neither to confirm nor refute this charge; the more concrete procedural aspects of it are presented in a quite technical and parochial way. Its basic constitutional claims are too vague to be judged on their merits and its more specific substantive moral assessments too stipulative to command serious attention.

The aim of this review article is not to judge the political merits of the grander project of common good constitutionalism but to examine the claims made in the book against the background of the legal and constitutional theories it purports to develop and those it seeks to leave behind. One of the stated aims of the book is to clear up confusion around the project, caused by the failure of commentators to distinguish between general claims about the nature of constitutionalism as such and specific claims about the American constitutional order.[16] On this score, the book must be judged a failure. Confusion abounds. But the book is also a call to arms against liberalism and progressivism of all stripes. Its success on that score will be for history to judge. Substantively, the book does lend itself to an authoritarian interpretation, although not (as its critics so far suggest) because it opposes itself to liberalism, but because it steadfastly refuses any link between constitutional authority and democracy.

COMMON GOOD CONSTITUTIONALISM AND RONALD DWORKIN: AN UNLIKELY PAIRING

Vermeule tells us that the principal use he makes of Dworkin's jurisprudence is negative, in that he invokes him predominantly as a critic of positivism and originalism.[17] This is an understatement. Albeit in an implicit fashion, Dworkin's work is pivotal, providing a juristic means of cutting the Gordian knot that links and separates morality and positive law, or, in Vermeule's preferred terms, *ius* and *lex*.

This requires some explanation. In the classical tradition, as restated with great clarity by John Finnis, the positive law is given its proper place when understood as an instantiation of the common good.[18] In the central case, law provides reason for action in conformity with its prescriptions. Positive law (*lex*) is integral to an overall conception of law because of the political necessity of *determinatio*, the setting of specific rules for the community, in a way that may be derived from natural

[15] See e.g. Dyzenhaus, above. Interestingly, some US 'moderate conservative' scholars have also perceived its authoritarian nature, see Bernard Keenan, 'Baptizing the State – Vermeule's Common Good' Critical Legal Thinking, 23 May 2022, available here: https://criticallegalthinking.com/2022/05/23/baptizing-the-state-vermeules-common-good/ (last accessed 16 October 2022).
[16] CGC, 12.
[17] According to Vermeule, Dworkin is 'the unsurpassed critic of positivism and originalism in Anglophone legal theory' (CGC, 5-6).
[18] See John Finnis, *Natural Law and Natural rights* (OUP, 2011).

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prescriptions of practical reason or specified from them in a somewhat arbitrary manner, as in the case of conventional rules.[19] The relative arbitrariness of *lex* is itself permitted as well as delimited by the requirements of practical reason.

In Finnis's interpretation of natural law, a system of positive law (or *lex*) is thus necessary but not sufficient for the flourishing of the community, which also requires the fulfilment of the general principles of justice (*ius*). The posited part is important and must not be ignored; *lex* is valued as the authoritative pronouncement of the rules of the community, a crucial means of settlement or coordination. In Finnis's view, law's 'source-based character' – its dependence upon social facts such as legislation, custom or judicially established precedents – is a fundamental and primary element in 'law's capacity to advance the common good, to secure human rights, or to govern with integrity'.[20] Hence the truth, albeit very limited, in legal positivism.[21] But this is a truth, Finnis continues, that natural lawyers (notably Aquinas himself) are and have long been well aware of (and put into circulation long before 'legal positivism' was invented as a juristic tradition).[22] Conversely it is a truth that legal positivists themselves are often blind to, because of their more basic methodological failure to engage with the reasons for having law.[23] As a result of positivism's failure to appreciate law as an inherently purposive institution, it fails to see the value even in the limited domain of the positive law it seeks to analyse. Once the purpose or point of law is grasped, its broader link to morality and general principles of justice is obvious: law is integral in securing the basic goods of the community.

Finnis's broader jurisprudential scheme entails that there may – or will – be moments when the law posited by the political community goes astray. In this 'non-central' or 'less-than-central' case we may end up with an 'unjust law', a law that is in some limited, systemic sense recognised as having been laid down by the relevant authorities, but which is nevertheless defeated by the requirements of practical reason all things considered. *Lex iniusta non est lex*. Just as a doctor's faulty prescription may still be described as medicine in one sense, but is not medicine in the full sense of the word or in the 'central case' of medicine, which would be medicine that contributes to the process of healing the patient, law can be properly posited and thus presumptively binding, but not worthy of moral respect. Precisely when law's presumptive authority is defeated is itself a question to be determined by the operation of practical reason, and has to take into account the damage done to the political community by actions of disobedience.

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[19] Ibid, 281-290.
[20] John Finnis, 'Natural Law Theories', Stanford Encyclopaedia of Philosophy, available here: https://plato.stanford.edu/entries/natural-law-theories/ (last accessed 16 October 2022).
[21] John Finnis, 'The Truth in Legal Positivism' in Robert George (ed), *The Autonomy of Law* (OUP, 1996).
[22] Ibid.
[23] John Finnis, 'Law and What I Truly Should Decide' (2003) 48 *American Journal of Jurisprudence* 107.

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Vermeule's entire project builds on a variation of this duality but is in some respects more far-reaching and in other respects more context-dependent: the classical tradition that had allegedly been so central to the American legal world throughout the nineteenth century, and that now needs to be reinstated, 'broke down' in the period 'before World War I and finally after World War II'.[24] The book does not even offer a rough sketch of an historical account as to how and why this occurred. But the claim echoes throughout the book. It is repeated in the conclusion, in the form of an injunction to effect a constitutional break with the 'immediate past', albeit again without any historical explanation.[25] In other words, it is not merely a *determinatio* or two that has gone astray, but generations of accumulated jurisprudential practice and intellectual wisdom that has departed from the 'central constitutional case' by elevating doctrines of liberalism and originalism in violation of the demands of natural law .

Is an unjust constitution no longer really a constitution? Things have gone very badly wrong indeed, yet not, it turns out, so badly wrong that the US needs a new constitution or even a constitutional amendment in order to remedy the situation. This is why Dworkin is so pivotal to Vermeule's argument; his interpretive, moral reading of the constitution apparently permits a return to the right constitutional path by judicial fiat, even if it is a path that Dworkin himself would have abjured.

It is thus less that Dworkin is 'used negatively' than that he is almost entirely subverted. Many, if not all, of the US Supreme Court's judgments that would likely be celebrated by Dworkinians are openly rejected by Vermeule, and vice versa. I will return to some of these substantive judgments later, on issues such as same-sex marriage and contraception. For those who are critical of the type of constitutionalism that Dworkin's account celebrates, this subversion of outcomes might evoke little more than a wry smile. But can the pairing of classical natural law and Dworkin be sustained as a matter of constitutional theory?

JURISPRUDENCE, CONSTITUTIONAL THEORY AND POPULAR SOVEREIGNTY

The fact that common good constitutionalism is presented *as* a constitutional theory, rather than merely a free-standing normative or juridical project, complicates things. The issue is that there are now three 'levels' to contend with, and not merely two. There is not only the ordinary law posited by the community (*lex*) and the more fundamental principles of justice (*ius*),[26] there are also the basic terms of the political community's constitutional arrangement. The issues raised at this level and the key

[24] CGC, 2. Legal philosophers need not always offer fine-grained historical analyses but it's hard to imagine a vaguer historical claim than this, which is particularly troubling when the breakdown it refers to is so central to the overall narrative.
[25] CGC, 181.
[26] Vermeule includes both *ius naturales* and *ius gentium* in this category.

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related question of political authority are, in effect, entirely elided in Vermeule's schema.[27]

The layer of complexity added by constitutionalism is apparent, perhaps even in an exaggerated manner, in the US, due to the historical significance of the constitutional text in its legal and political culture, a text which declares itself to be authored by 'We, the people'. There is no discussion of the idea of popular sovereignty in *Common Good Constitutionalism*. But because of the constitutional context, Vermeule has to spend a lot of time and energy in debunking 'originalism' as a theory and doctrine, a theory that, in different versions, is said to have become dominant among conservative scholars and judges. Vermeule considers originalism redundant and even an obstacle to a more radical conservative programme that is relatively untethered from the text and from originalism's defensive posture.[28]

Although Vermeule's main argument against originalism is formal, in the process of examining it we can open a door into the more substantive issue of constitutional authority. Vermeule proceeds by noting that originalism doesn't tell us why, out of the many possible ways of discerning the original meaning of the text, we should pick one or the other. And if it did, then the normative argument offered would no longer be originalist in any sense, but an argument on the basis of a prior or more basic principle of political morality. Why, then, not just focus on the real issue, which is the best principle of political morality with which to interpret the posited law – including constitutional law – given its necessarily limited determinacy? On that question, the answer, for Vermeule, is straightforward: the classical natural law should be used to interpret all law, constitutional law included. To the extent that originalist theory conforms to this, it is fine as far as it goes, but to the extent that originalism claims any autonomous authority, it should be utterly rejected.

Vermeule is clear that *determinatio* reaches all the way down to the prescriptions in the constitutional text and its official interpretation. As he puts it, 'determination can operate *on* as well as *within* the constitutional order'.[29] That the requirements of natural law under-determine not merely conventional rules but also constitutional principles appears to be consistent with (and even entailed by) natural law doctrine. In the natural law approach, the arbitrariness attached to conventional matters of

[27] This may well reflect a broader deficiency in natural law theory, as suggested in J. Joel Alicea, 'The Moral Authority of Original Meaning' (2022) 98 *Notre Dame Law Review* (forthcoming): 'Natural-law justifications for originalism have paid insufficient attention to the importance of developing the argument for *who* has the law-making authority within a regime'.

[28] Adrian Vermeule, 'Common Good Constitutionalism' *The Atlantic* (April 3 2020), available here: https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/ (last accessed 16th October 2022) ('originalism has done useful work, and can now give way to a new confidence in authoritative rule for the common good').

[29] CGC, 47 (italics in original).

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determinatio (*lex*) simply extends to the basic constitutional agreement itself.[30] This extension implies a degree of arbitrariness when it comes to identifying such matters as the correct balance of authority among the various law-making, law-applying and law-executing institutions.[31] (Vermeule suggests that arbitrariness reaches even further down to the content of *ius* itself, since he acknowledges legitimate disagreement on the common goods that are the underlying normative grounds of the constitution, but we can bracket that for now.)

Assuming that this ambivalence on the balance of institutional authority were well-founded in some abstract sense, what about the value of settlement and in the case of the constitutional settlement, one that (rightly or wrongly) expresses a deeper level of commitment in the political community over the constitutional arrangement, or the 'laws of law-making' as Frank Michelman puts it?[32] Does the constitution have any weight over and above the ordinary ordinances of the land?

There is some discussion in the book of a 'second-order' argument for originalism, that weight should be given to the constitutional text as understood at the time it was promulgated for reasons of settlement and stability. The principles of natural law do allow for that, according to Vermeule, but even on that limited ground, originalism 'fails utterly in protecting the stability of meaning, because it cannot, by itself, answer the question at what level of generality meaning should be read.'[33] And at a minimal level, all legal systems, whether based on originalism or otherwise, give *some* weight to duly enacted law, so originalism has nothing 'original to offer' at all.

Originalism is an easy target for Vermeule only because there is no acknowledgement in *Common Good Constitutionalism* of the specific issues raised at the mid-range level of constitutional theory, the level inhabiting the domain between *ius* and *lex*, if also overlapping with them. As a result, there is no principled difference in Vermeule's schema between constitution-making and ordinary law-making, or even between constitution-making and exercises of delegated executive authority. All that positive law can offer, even a written constitutional settlement, is a rebuttable presumption of its binding force. We shall return to a consideration of the circumstances in which an exception to the presumption might be claimed below. But is this elision sustainable as a matter of constitutional theory?

To put the point more concretely and with the use of a typical example of the arbitrariness of conventional *determinatio*: positive legal or conventional rules (*lex*) which stipulate whether to drive on the left or the right of the road or to drive at 60

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[30] This seems to be in keeping with natural law approaches, such as offered by Robert George, '[n]atural law theory treats the role of the judge as itself fundamentally a matter for *determinatio*, not for direct translation from the natural law' (cited by Alicea, above, 55).

[31] For Finnis's more considered position on matters of constitutional design, see Conor Casey, 'Constitutional Design and the Point of Constitutional Law' *American Journal of Jurisprudence* (forthcoming).

[32] Frank Michelman, 'Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture' (1998) 86 *California Law Review* 399.

[33] Conor Casey and Adrian Vermeule, 'Myths of Common Good Constitutionalism' (2022) 45 *Harvard Journal of Law and Public Policy*, 103, 129.

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rather than 55 miles per hour are arbitrary in a way constitutional rules or principles which proscribe restrictions on free speech or which specify the powers of law-making in relation to law-applying institutions are surely not. It is not that the latter are necessarily or obviously derivable directly from some moral principle (as in the case of the law prohibiting murder). It is that they touch on more fundamental *political* issues, and appear to have some significance as matters of constitutional agreement among the people in a particular polity. They establish the ground rules for further political action and for authorship of positive laws, and it surely matters that law is the product of legitimate authority.[34] To put the point differently, it is important to establish *who* has law-making authority in the regime, and the constitution may well give an answer to that. (We can put aside the possibility of a 'constitution' which says nothing about this, as Vermeule is dealing with a concrete constitutional order which does.)

There is of course an even more fundamental question, or at least a prior one: who has *constitution-making* authority in a particular regime? The answer to this is commonly given by the principle of popular sovereignty itself. So for the most basic of laws, the legitimate author might be said to be 'the people' as a whole. This of course raises a lot of further questions around the nature of this entity and how it might be identified or represented. But be that as it may, in *Common Good Constitutionalism*, there is no theory of constitutional legitimacy above or beyond that which would apply to the positing of any ordinance, no matter how trivial, such as a directive about parking fines. In fact such a theory seems to be ruled out, since, to adopt a different vernacular, there is no recognition of any distinction between higher and ordinary law-making or between constitutional moments and day-to-day politics.

Now, one might construct an argument that deliberately attempts to blur this distinction, but none is forthcoming here, beyond the appeal to Dworkinian interpretivism. On the contrary, Vermeule rejects one of the more recent attempts in the US to do so, Jack Balkin's 'living originalism', which argues for a continuing authority of the people to effectively change the constitution by reinterpreting it (or at least its vague provisions) through the ordinary political process.[35] In the language of natural law, for 'living originalism', there is retention of a *customary* popular law-making and constitution-making (through interpreting) authority that continues after the founding period, and notwithstanding any formal amendment procedure.[36]

It is worth noting that the distinction between higher and ordinary law-making is given prominence by some natural law scholars themselves, including those self-

[34] This seems to be a significant part of the classical tradition itself, shared by Aquinas, see Alicea, above, 15.
[35] Jack Balkin, *Living Originalism* (HUP, 2014). Of course as a historical matter it could be the case that a political regime is deliberately constructed with a legislature that acts as a continuing constituent assembly, but the US is not so constituted, so a specific argument is required.
[36] Alicea, above, 49: 'while preserving the people's authority may not require originalism across *all* regimes, it *does* require originalism in a regime operating under a constitution (written or unwritten) that is designed to serve as a higher form of positive law than acts of ordinary politics'.

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described as originalist, by restating a well-established position from the principle of popular sovereignty. In this 'natural law originalism', the constitution, as a higher-law, is said to represent the authority of the people to constitute a government, and this is, and should be kept distinct from, the authority to govern its ordinary day to day affairs. As Alicea puts it, in rejecting what he calls the 'thin account' of political authority offered by John Finnis (as well as Vermeule's own account), popular sovereignty 'is *itself* part of what undergirds the common good: it explains why a particular ruler is entitled to our obedience beyond the brute sociological realities that, by themselves, cannot supply a reason for obedience that is consistent with the common good.'[37]

Although this argument is doubtful,[38] it succeeds in making political authority more visible as a constitutional issue. It clarifies the stakes. The argument against a Dworkinian-style judicial authority offering a moral reading of the constitution is apparent: if the authority of the constitution requires adherence to its original meaning, this extends to the way it established institutional powers. In other words, *assuming* that adherence to the popular understanding of the constitution at the foundational moment is required, this includes popular understanding of the scope of the judicial power. It is then a historical question whether and to what extent the constitution in its original meaning was understood to empower the judiciary vis-à-vis the other branches of government.

LAW, DEMOCRACY AND THE SCOPE OF JUDICIAL POWER

In contrast to natural law originalists, Vermeule offers no argument for popular sovereignty or for the constitution as an expression or transmission of the people's will and authority. The constitution has no value over and above the requirement to give some weight to what has been duly decided – democratically or otherwise – by institutions that are recognised to have some authority.[39] Common good constitutionalism is ambivalent on the question of the scope of judicial power in respect to legislative power in the constitutional order, commonly captured by the debate between 'political versus legal constitutionalism'.[40] But what is clear is that the scope of judicial power does not just depend on, nor is it strictly limited by, how much authority has been conferred on the judicial branch in the positive

[37] Alicea, above, 32.
[38] Alicea's argument may succeed as a moral argument for popular sovereignty, but not for a higher-law of constitutional authority because, in Alicea's own retelling, that all depends upon sociological facts.
[39] Many questions remain from Vermeule's dismissal of originalism. Is the meaning of the text as it was originally understood by the community when it was ratified irrelevant, or does it have some weight that may exceptionally be trumped by natural law reasons? Or are we to look at the plain fact meaning of the text from the get-go rather than the intentions of the community in promulgating it?
[40] CGC, 10.

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constitutional law. It is in offering a way to evade this limit that Dworkin's jurisprudential model is essential to the enterprise of common good constitutionalism.

The figure of the judicial Hercules is thus crucial in facilitating a blurring of the issues of current authority and past authorisation and of the associated levels of constitutional jurisprudence.[41] This is because constitutional *determinatio* of the Herculean variety takes place at all three levels simultaneously; application of specific legal rules to a particular dispute (level 1), based on interpretation of a constitutional text (level 2), using moral principles that are embedded in the constitutional culture in a way that offers the 'best fit and justification' of the existing body of law, understood broadly and over time (level 3).

Central to the Dworkinian justification of this apparently immense judicial power is a distinction Dworkin draws between principle and policy: as long as judges restrict themselves to determinations of principle, they will avoid trespassing into the domain of law-*making*.[42] Vermeule rejects this justification. Instead, he offers a watered-down version of Hercules, or what he calls 'Dworkin plus deference'.

Vermeule's less-than-fully Herculean judge is not guided by a heroic quest of determining moral principles *tout court*, but is regulated by a principle of institutional 'role morality'.[43] This principle, which is said to be a fundamental component of law's morality, underpins a principle of 'judicial deference'. It directs judges to give respect to the legitimately enacted positive law and means that judicial interpretation 'is always limited and conditioned by institutional roles, legal presumptions and standards of review, default rules, and other legal mechanisms for promoting institutional settlement and stability'. According to Vermeule, however, 'the very nature of determination is that background principles do not fully specify the content of positive law.'[44]

But this principle of the under-determination of positive constitutional law from the principles of natural law surely ends once the positive law has been specified. Thereafter, a different calculation must take place. This difference, on one influential account, is the function of law's authority and a very feature of law's nature: providing an exclusionary reason for action.[45] We need not share that particular account of law's authority to acknowledge that there is a difference in the balance of reasons for action once the community has determined the rules to be applied, including how they are to be applied and by whom. The principle of *determinatio* does not leave the institutional balance open even after it has been settled.

Vermeule, however, suggests that even after institutional specification there remains a significant element of interpretative judicial power and discretion. This is

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[41] In a way that Finnis himself took express objection to (see John Finnis, 'On Reason and Authority in Law's Empire' (1986) 6 *Law & Philosophy* 357, 370-76).
[42] Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057.
[43] See eg CGC, 146.
[44] Casey and Vermeule, above, 125.
[45] See Joseph Raz, 'Facing Up: A Reply' (1989) 62 *South California Law Review* 1153.

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not only because of the vagueness of the principle of role morality,[46] but because that principle is itself highly qualified. 'Those who apply the enacted law (*lex*),' Vermeule tells us, 'must inevitably, in some domain of cases, have recourse to general background principles of law (*ius*), including the *ius naturale* and the *ius gentium*.'[47]

What is the judge doing in having recourse to these background principles? And in what 'domain of cases' do the background principles come to the fore? Vermeule is keen to reject the argument made by prominent legal positivists such as Hart and Raz that in hard cases (in the penumbra of legal meaning) there is effectively judicial law-making (albeit of a type that is conceptually and practically distinct from legislative law-making).[48] Vermeule argues that there is, on the contrary, a weak form of Dworkinian interpretivism at work here. But despite all his protestations against positivism, what Vermeule offers is essentially a version of 'positivism plus interpretation':

> Judges are not to directly decide for themselves, in an all-things-considered way, what the common good requires; that is for the public authority in the first instance. The structure of the judicial enquiry is different. It is primarily to ask what the public authority has done by ascertaining what the authority has said; and secondarily to ask whether the court faces the *nonstandard* case in which the authority's rational ordering for the common good has been imperfectly captured by what the authority has said, read in the light of larger background principles.[49]

So it is not a case of constitutional agnosticism all the way down; a certain principle of judicial deference can be inferred from the notion of the common good. But deference is then qualified in an important, albeit highly imprecise, manner: limiting it not only in a 'hard case' but in any 'non-standard case'. It would seem from this 'second' task of judging, at least by inference, that only when the authority perfectly captures the common good read in the light of background principles do judges simply proceed by applying what the public authority has laid down.[50] This could mean that deference all but disappears.

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[46] Role morality applies when we have a fairly clear idea of the role that is meant to be played. We might disagree about what precisely makes a good doctor, but there is little disagreement as to their ultimate goal. This does not seem to be true of the judicial function.

[47] Casey and Vermeule, above, 125. In critiquing originalism, Vermeule turns to the *Curtiss-Wright* case, which suggests that the American constitutional order rests upon the *ius gentium* in a way that 'originalists' cannot account for (CGC, 89).

[48] See, especially, Joseph Raz, 'Law and Value in Adjudication' in *The Authority of Law* (OUP, 1979).

[49] CGC, 83.

[50] As noted earlier, Vermeule concedes that there will be disagreement even on the basic elements of the common good, although due to its presentation in the book at such a high level of generality, those disagreements are not brought to the surface and the common good remains entirely opaque. Elsewhere the author says that it is 'irrelevant' that there is disagreement between classical lawyers 'over the content of the common good and *ius* in hard cases' (Casey

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When discussing the principle of 'presumptive textualism', drawing on Thomas Aquinas, Vermeule again stipulates, as a general rule, against the judicial interpreter making all-things-considered first-order judgments. But he then introduces a different qualification, now based explicitly on the exception. The general rule of deference to the legislature, we are told, applies only outside the 'emergency situation'.[51] Where an official has to consider the possibility that the command at issue has gone 'terribly wrong', the judge faces a different situation and must consider the broader context of the law, using the whole of the *ius naturale*. '[O]n the classical view' we then learn, with much ambiguity, 'the positive law can *never* entirely exclude consideration of the law in its broader sense of *ius*, *especially* in hard cases.'[52]

Is a presumption in favour of *lex* as an application of *ius* rebuttable only in an emergency or exceptional situation? Or, as Vermeule, elsewhere puts it, in any 'noncentral case'?[53] Or is *lex* to be over-ridden only in a hard case? Or, as the last quoted passage suggests, in potentially in *any* case, although *especially* in a 'hard-case'? Does the emergency situation only emerge when official commands have gone 'terribly wrong', or does it transpire against the entire culture of constitutionalism, as is suggested by Vermeule's insistence on a break with the last decades of constitutional liberalism? If so, can judges repair that extent of damage through constitutional adjudication? Would that not cause disruption to the legal order?

We know that the judge is not meant to immediately determine each case on the basis of justice 'all things considered', but only to look to that question at a second stage of enquiry. The purported rationale for this is clear enough; settlement and stability have some value, and that is the value of having the positive law, as Finnis outlined. But this has to somehow be weighed against justice 'all things considered'. This, again, is why Vermeule rejects not only positivism but also originalism, which he sees as nothing other than a species of positivism, and which is said to 'fetishise' the second-order goods of stability and settlement:

> Finally, institutional settlement and stability, however important, are hardly the only common goods. This sort of second-order consideration is important, but so too are first-order ones. The classical tradition emphasizes that justice is the ultimate aim of law, and that peace and justice are both fundamental aims of law. If the originalist regime yields "stability" of a sort by producing a steady, predictable stream of deeply unjust first-order results, or merely fails to prevent such results, then the common good condemns rather than supports

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and Vermeule, above, 143). The concept of a 'hard case' usually refers to difficulties arising over application of the law in specific disputes, i.e. only over its precise meaning at the point of application rather than over the content of general principles themselves. But this would be inconsistent with the claim that legitimate disagreement occurs over the content of the common good. And this is quickly glossed over on the basis that there is also said to be disagreement over 'all positive constitutional law and texts', foundational and otherwise.

[51] CGC, 76 (italics added).

[52] CGC, 83 (italics added).

[53] CGC, 84.

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> originalism. At a minimum there should be some reflective equilibrium between the second-order goods of settlement and durability, on the one hand, and evaluation of the justice of first-order outcomes, on the other. Otherwise, the praise of second-order goods threatens to become a kind of sacred fetish, overriding all first-order considerations in the name of a partial and myopic account of what justice requires.[54]

Are institutional settlement and stability themselves common goods? Or is this a slip of the pen? Vermeule elsewhere lists the common goods as 'peace, justice, abundance, health, safety and economic security', although he gives us little further clues as to how these are to be interpreted.[55] Assuming settlement and stability are only instrumental to the common goods, or 'second-order' considerations, how are second-order and first-order considerations to be weighed *together*?[56]

Natural law originalism, in contrast to common good constitutionalism, at least provides a clear response. In the case of a conflict between the original meaning and the natural law, one looks to the specific remedies provided in the jurisdiction. The upshot of this attention to the significance of authorisation and its limits can be spelled out: even if the original meaning of a legal text conflicts with the natural law and is not binding in conscience, this does not entail a judicial power to disapply it on that basis alone. To discern whether such power exists, it is necessary to consult the constitutional sources. In the US, according to Alicea, there is clearly no such power. 'As legal historians have shown', he argues, 'the original meaning of the Constitution did *not* give judges the authority to invalidate positive law in light of the natural law' (but since *Marbury v Madison* there is a power to disapply it on the basis that it violates constitutional law).[57] Although this imposes an important constraint, it is not the end of the story; on the contrary, the system provides 'many ways' to resolve conflicts between the text and the natural law, namely 'through the political process'.[58] It is worthwhile adding that the lack of judicial authority to invalidate law or render judgment in defiance of positive law is not altered even by

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[54] CGC, 114.

[55] CGC, 7. At the beginning of the book, we are offered a very brief and inadequate account of the common good, based on 'peace, justice and abundance', which is later on updated to include 'health, safety and economic security'.

[56] To insist on the value of settlement as a kind of static second-order value also downplays the necessarily dynamic aspect of constitutionalism and the ebb and flow of constitutional change; this speaks not only to shifting positions on substantive issues but to the proper role of the judiciary in relation to the legislative and executive branches. Even if one could infer a constitutional supremacy of the higher laws of the constitution, a further argument is required as to why this should result in a *judicial* supremacy, which is often generated by the judges and lawyers themselves rather than stipulated in the settlement.

[57] Alicea, above, 56.

[58] Alicea, above, 9. Moreover, Alicea argues, 'Just as it is possible to simultaneously believe that a statute is unconstitutional but that a court lacks jurisdiction to hear a case challenging the statute, it is possible to simultaneously believe that the original meaning is not binding in conscience because it conflicts with the natural law but that a court lacks the authority to declare it so (above, 54).

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the fact of an extremely unjust law, such as one directing an ethnic minority to the gas chambers. 'Rather, the judge's obligation in that situation is, as Aquinas says, simply to refrain from rendering judgment according to the corrupt law. The judge could accomplish this by recusing herself from the case or, in extreme situations (such as where the corpus of positive law is fundamentally corrupted, as in Nazi Germany), by resigning from office.'[59]

Vermeule's alternative is highly ambiguous. If we assume, for the sake of argument, that the judge does indeed face a 'non-standard case', where justice 'all things considered' clearly directs them towards a different outcome than applying the settled law, then what? Does the judge look at the *reasons* for the constitutional allocation of powers, for deference to the legislature or the constitutional convention as part of the balance of reasons? Or does this only weigh as a matter of the stability of the settlement? Does judicial power stretch to overturning a clearly established principle as well as a precedent? At what point of systemic injustice should the judge simply resign?

The examination in the book of concrete case-law leaves us none-the-wiser. In the discussion on the merits of the *Lochner* case, more specifically critiquing the majority opinion and extolling the merits of Justice Harlan's, but not Justice Holmes's more famous dissent, deference underwritten by an appeal 'to a democratic theory of political morality' as argued by Holmes is expressly rejected.[60] Deference to the state legislature is urged as the correct judgment only because operating a margin of public discretion to promote the common good had long been part of the settled case-law.[61] What ultimately seems to matter, however, is not settlement as such, or deference itself, but an appreciation of the 'true ends of government', which, apparently, includes the stipulation of maximum working hours for bakers. Once this is understood, constitutional process, whether deference to the state legislature or judicial interpretative power, is seen merely as a means to an end. But to what end?

A PLAGUE ON ALL MODERNIST HOUSES

What are the true ends of government, according to common good constitutionalism? Although listed perfunctorily at the start of the book, the main clue lies in the part of the project that criticises originalism and positivism. Underlying this critique is a more substantive concern with the 'modern' turn of constitutional theory towards 'liberal values'. But if positivism and originalism are sketched with a broad brush by Vermeule, liberalism resembles a Jackson Pollock. To some extent this is a result of a feature of liberalism itself, an undoubted aspect

[59] Alicea, above, 58.
[60] CGC, 67.
[61] CGC, 65.

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of its own political and historical evolution; its many varieties give it a certain flexibility and indeterminacy. This means it is partly a victim of its own 'success', with some commentators wanting to maintain the label and others insisting on their distance from it. Nevertheless, it is possible to identify various branches of liberalism and distinguish among them, at least for certain purposes. Vermeule uses the term in such an undifferentiated fashion that the object of his critique is opaque, spanning dismissals of libertarianism, classical liberalism, neoliberalism, social liberalism, modernism, and progressivism.

As a matter of constitutional theory we find out that the liberal tradition includes both progressives (its left wing) as well as originalists (its right wing).[62] These are described as the twin pillars of the constitutional 'establishment'.[63] But in the substantive chapters of the book, Vermeule's primary target is a form of liberal individualism based on individual autonomy,[64] and an extensive (and in Vermeule's view mistaken) reading of 'rights as trumps'.[65]

If some of the language of common good constitutionalism resonates with Rousseau's critique of liberal individualism, and his notion of the 'general will' (the *volonté génér*ale, in contrast with the aggregative *volonté de tous*), there is no discussion in the book of this or any similar ideas. Instead, we are offered a series of diatribes against 'progressivism', which features throughout the book as a placeholder for various liberal ills. Rather than examining and critiquing these, progressivism is simply lumped together with other philosophies such as libertarianism, even though as a pair they would usually be contrasted, particularly on socio-economic matters.[66]

A precise target is thus missing. But underpinning Vermeule's critique of all shades of progressivism is a desire to rescue the soul of American constitutional culture from the perceived ills of political modernity. Progressivism and libertarianism are identified, and in the same breath dismissed, as the twin evils of 'modernism'.[67] What the author means by this, beyond a bald assertion that modern constitutionalism abandoned the classical tradition and the concept of the common good, is unclear. Why modernism is such a bad thing is unexplained, beyond the hint that Schmitt didn't much like it either.[68] It all, ultimately, appears to be based on a terrible misreading.

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[62] CGC, 164.
[63] CGC, 25.
[64] CGC, 23.
[65] The notion of rights is not jettisoned entirely in Vermeule's project but only detached from its liberal embrace; instead, rights are 'founded in the injunction of justice to give to every person what is due to them in a political order devoted to the common good' CGC, 6 (he also rejects, without any explanation, the utilitarian scheme of aggregating preferences).
[66] Are there no important differences between say Nozick and Rawls? Progressive constitutionalism itself is used as such an all-encompassing term that it includes 'living constitutionalism' as well as 'common-law constitutionalism', the latter far from obviously 'progressive' in any sense (CGC, 117).
[67] CGC, 67.
[68] CGC, footnote 180.

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There is a fairly well-established distinction in constitutional theory between ancient and modern constitutionalism, the first based on a conception of the enduring health of the body politic; the second based on a conception of the constituent power, a human power of constitution-making.[69] But this latter sense of constitutional modernism far predates the alleged break with the classical tradition in the interwar era that so incites Vermeule; it is temporally linked with the modern revolutions of the late eighteenth century and has antecedents in early modern thought. An explanation for this misstep is that the author conflates modernism with some crude version of post-modernism, equating it entirely with the 'will', and even the 'will to power', as opposed to 'reason'.[70]

Common good constitutionalism thus exaggerates one side of modernism, its scepticism, at the expense of entirely ignoring the other, its attempt to reconstruct a legitimate foundation for authority in the context of secularism and differentiation. This reconstruction may be based on different priorities, from the avoidance of anarchy to safeguarding reasonable disagreement, from minimising social inequality to respecting fundamental rights. In one form or other, constructing a basis for legitimate authority is the concern of modern constitutional theorists from Hobbes, Rousseau and Kant, to Habermas and Rawls. Far from rejecting reason in favour of will, these theorists make an attempt to unite reason and will. One may, of course, be unpersuaded by each or all of their attempts, but not because they discard reason.

The entire thrust of the argument against liberalism, progressivism, and modernism is thus stretched beyond credulity, as encapsulated by this non-sequitur:

> Animated by this mythology (of endless liberation through the continual overcoming of a reactionary past) progressive jurisprudence restlessly defines new targets to be overcome. In so doing it distorts the real nature of law by instrumentalising it to serve the will of individuals who seek liberation from any and all unchosen constraints… It *thereby* uncouples law from reason, the exercise of which is grounded in the natural law and directed toward the common good.[71]

The project of liberating individuals in this manner, which remains un-ascribed to any particular thinker or movement, may well be wrong or ill-conceived, but not because it necessarily uncouples law from reason. There is nothing *per se* in the project of liberation which could not be reformulated and offered on the basis of some version of moral reason (however faulty in the eyes of Vermeulerites). In other words, it is simply a sleight of hand, albeit a clumsily concealed one, to dismiss the modern project of emancipation because it said to be based on the 'will to power'

[69] See e.g. Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund, 2007 [1940]).
[70] CGC, 71.
[71] CGC, 117 (my italics).

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and therefore inimical to reason. On the contrary, what is required is a reasoned argument against it. Unfortunately, none is forthcoming.

The liberal progressive does not and need not reject the 'fixed touchstone' of reason as Vermeule calls it.[72] This may, for example, be cast into the future, as when a horizon of rational consensus is projected, towards which we might move through deliberation in the process of uniting reason and will.[73] In that respect, it is not originalism which looks to be the mirror image of modern liberalism (as suggested by Vermeule), but common good constitutionalism itself: both are moralistic in their constitutionalising missions, only disagreeing on what morals to enforce and how to enforce them.

Although we are not informed about the moral principles of common good constitutionalism, we can discern what they are positioned against.[74] Vermeule chastises the progressive, while conflating her with the libertarian (and at one point the 'radical libertarian'),[75] for erring in the assumption that as doctrine develops it inexorably unfolds in the direction of ever-increasing individual autonomy, a 'one-way ratchet of "expanding liberty"', which is understood 'in opposition to communal aims'.[76] No progressive, libertarian, or 'radically libertarian' for that matter, is actually identified with this proposition; no work of legal or political philosophy examined or critiqued. For Vermeule, it is simply a truism, and so requires no explanation or analysis. A moment's thought, however, would reveal the absurdity of the proposition, as if freedom were a kind of pie that could simply be increased by each and every individual without impact on any other. And of course the question of how any one person's liberty is to co-exist with another's is a staple of political and legal theorising, perhaps it is *the* question for the liberal tradition, which has long tried to reconcile the twin principles of liberty and equality in work ranging from Kant to Rawls. One of Vermeule's few insights, that every legitimate government, whether explicitly or implicitly, inescapably works with some conception or other of the common good, should have alerted him to this very point.[77]

There is no engagement with liberal philosophy at all – in fact we can presume it is all dismissed as so much modernist nonsense. But neither is there any engagement with an alternative Enlightenment tradition, figuring, alongside Rousseau, critics of liberal individualism such as Hegel, Marx or, within the Catholic tradition itself, more recent philosophers such as Alasdair MacIntyre.[78] Unlike

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[72] CGC, 118.

[73] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1992); Seyla Benhabib, 'Deliberative Rationality and Models of Democratic Legitimacy' (1994) 1:1 *Constellations* 27.

[74] One of the striking features of the book is that although it makes constant appeal to classical nature law it tells us virtually nothing about it.

[75] CGC, 129.

[76] CGC, 126.

[77] CGC, 14.

[78] See e.g. Alisdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 1981).

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Vermeule's neo-classicism, these figures represent other traditions – such as socialism, communitarianism, and republicanism - which, while critical of liberalism, take political modernity seriously.

Something in the vicinity of a conceptual argument is alluded to in the distinction Vermeule draws between common good constitutionalism's view of the law as intrinsically moral and the progressive's view of it as merely instrumental, and in Vermeule's view, instrumental to an 'extrinsic' agenda of radical liberation.[79] Through the pursuit of goals that are 'relentlessly liberationist', the true nature of law as an 'ordinance of reason' is, in Vermeule's words, 'warped', its integrity 'twisted'.[80] But this, on its own, is another semantic sleight of hand. How do we know its 'true' nature? Well, Vermeule implies, we listen to Aquinas. But doesn't Aquinas also tell us that law is a means to an end, the end being the common good of the community?[81] Not quite, because some ends are said to be intrinsic and others extrinsic to the law. How do we know which is which? Well, we turn to the fundamental background principles of the constitutional order derived from the natural law and the law of nations, as declared by Aquinas. In other words, we are offered a version of… originalism, only one which venerates a different set of texts from those espoused by US constitutionalists.

The claim that radical liberation is the goal of all progressives is curious, not least since the label 'progressive' incorporates everyone from common-law constitutionalists to originalists. But even if we put that claim to one side, the distinction between intrinsic and instrumental views of the law cannot do the immense work required of it. There is of course a venerable debate in jurisprudence between positivists and procedural natural lawyers (encapsulated in the well-known debate between H.L.A. Hart and Lon Fuller) on the inner as opposed to external morality of law, a debate which has a level of analytical purchase and has even reached some degree of consensus when it comes to evaluating the rule of law or principle of legality.[82] But none of this is referenced in *Common Good Constitutionalism* and it doesn't help Vermeule's case since it pivots on the link between procedural propriety and individual autonomy and avoids the substantive moral claims that his project insists on.

Vermeule's agenda no doubt lies elsewhere, as the discussion of *Obergefell v Hodges* demonstrates. There he adopts the inflamed rhetoric of the culture wars, casting so much heat and so little light on the constitutional issues that it might be wise not to add to the flames.[83] The US political context and the passions excited

[79] CGC, 121.
[80] CGC, 120-121.
[81] In a jointly authored article, we learn that on one view, defended by John Finnis and Robert P. George, even 'the common good at the level of the community is ultimately instrumental' (Casey and Vermeule, above, 112).
[82] See recently, Joseph Raz, 'The Law's Own Virtue' (2019) 39:1 OJLS 1, coming closer to Fuller's position.
[83] Vermeule here employing the language of 'bigotry' and of 'heroes and saints', especially around CGC, 119.

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by its recent constitutional battles undoubtedly plays a large but largely unspoken role in Vermeule's project. But it vividly belies the claim to be engaged in a contest of reason rather than of will, or to favour 'development' over reaction, suggesting a bitterness provoked by losing this particular 'battle of will'.

Little substantive argument is offered against the constitutional recognition of same-sex marriage, other than that it departs from the inherited constraints of the natural law. At this point, one might ask, what happened to the principle of *determinatio*? This, recall, on Vermeule's account, operates not only within but on the constitutional order. If reasonable disagreement even extends further, into the common goods themselves, why not extend the good of marriage as a union of two persons committed to one another? Simple and unargued appeals to the tradition of the past are no more or less compelling than the progressivists appeal to the heroism of the future. Vermeule here seems more upset with the fact of defeat and the manner of the loss, since, he claims, 'on the progressive view, it was right and just to have same-sex marriage not merely embodied in law, but declared a requirement of fundamental justice, coupled with a conspicuous defeat of the forces of reaction'.[84] So, a victory of justice and reason, after all? But to think that what matters is the conspicuousness of the defeat indicates the personal feeling of loss, not least because how conspicuous is the defeat will depend on the actions and reactions of the defeated.

Can the hint of an argument be discerned from Vermeule's claim that the right to same-sex marriage is based on a 'radically libertarian philosophy'? It might be tempting to ask in response whether there is a less libertarian institution than marriage? Historically, it has been opposed by socialists, feminists and radicals precisely for undermining the liberty, independence and autonomy of women. The argument that the *telos* of the institution is oriented to the common good through 'reproduction', which presumably is at the core of Vermeule's upset, is not fleshed out here. There's no argument offered as to why expanding marriage to same-sex couples would lead to less flourishing and reproduction among opposite-sex married couples. It is no doubt true that *Obergefell v Hodges* overturns a traditional conception, perhaps in a radical rather than developmental way, or even 'breaks' it,[85] but that, on its own, is a poor argument for rejecting it. And we are not offered any other.[86]

There is a related constitutional question which could be asked here, and although it is not one Vermeule directly asks, it can be inferred from his upset with *Obergefell v Hodges*, and that is about the wisdom in judicializing such contests. Putting to one side the particular constitutional settlement, it is not arbitrary whether it is judges or parliament which makes a certain type of decision. One may support

[84] CGC, 120.
[85] CGC, 133.
[86] Similarly one might construct an argument against abortion rights (although none is forthcoming here) but to dismiss them only on the basis that they allegedly promote a 'radical libertarianism' makes little sense. One might as well flip this around and say that anti-abortionists are the radical libertarians, promoting the life and liberty even of the unborn.

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putting into legislation the legal powers of officials to perform same-sex marriage without thinking that the best social route is for same-sex marriage to be declared a fundamental requirement of justice and a task for the court to accomplish. One reason for that could be the thought that to win such things legislatively, and to have the backing of democratic majorities, is to give them more solidity over time.[87] One may simply have more faith in a democratic majority than in a judicial elite.

This raises a point that Vermeule could have made but didn't and it is interesting to note why. There *is* something akin to a position of constitutional progressivism which has come to dominate in much of the academy and which should be subjected to critique like any other. Progressivism in this sense is associated with a strong legal constitutionalism, one that has, if with some exaggeration, been said to have developed into a constitutional 'juristocracy'.[88] There is a robust critique of this 'over-constitutionalisation', which could be, and has in fact been, taken up by *political* constitutionalists as well as non-constitutionalist programmes of democratic renewal.[89] But this is not part of Vermeule's argument.

At a lower level of abstraction, and with more concrete constitutional analysis, the case could also be made that there is a link between legal constitutionalism and a form of economic liberalism, particularly one which aims to constrain democratic majorities. Even though there are some gestures towards a critique of economic liberalism and the importance of recognising the coercive aspects of private power, this remains entirely undeveloped in the project,[90] as does the startling substitution of 'abundance' for 'scarcity', as if a passing assumption could overturn centuries of economic thinking.[91] More broadly, it is as if Vermeule *doesn't want* to make the argument against legal constitutionalism. And the reason, in fact, is obvious: it comes down to his equivocation on the value of democracy.

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[87] Think of the recent overturning of *Roe v Wade* in *Dobbs v Jackson Women's Health Organisation*.
[88] The term is associated with Ran Hirshl but was in fact coined by Keith Ewing, see The Bill of Rights Debate: Democracy or Juristocracy in Britain?' in KD Ewing, CA Gearty and BA Hepple (eds), *Human Rights and Labour Law. Essays for Paul O'Higgins* (London: Mansell, 1994) 147–187.
[89] See Martin Loughlin, *Against Constitutionalism* (HUP, 2022).
[90] CGC, 14 and 50, following Dewey and Hale. Not only is private power unexamined, the relation between private and public power is completely ignored. There is a very brief, perhaps accidental, allusion to the power of the authority to intervene in the case of inequality (CGC, 155), cited from the 'Compendium of the Social Doctrine of the Catholic Church' (2004, Pontifical Council for Justice and Peace).
[91] This is mentioned first at CGC, 7, and then reiterated throughout as part of the triptych of 'peace, justice and abundance', to which he adds 'health, safety and economic security', but is never explained. Nor why, in a context of abundance, economic security would be an issue.

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THE AUTHORITARIANISM OF COMMON GOOD CONSTITUTIONALISM

Popular sovereignty, as we have seen, plays no part in common good constitutionalism, even though it is central to some strands of natural law thinking. But what about the principle of democracy? Leaving to one side whether the political ground rules are formulated in a canonical text or otherwise, what role does, and should, democratic authority play in the day-to-day governance of the polity?

Despite the signalled importance of a degree of deference to the political branches as a feature of the institutional division of labour and the application of the principle of 'role morality' alluded to earlier, common good constitutionalism professes to take no stand on democracy in general, or on the debate between legal and political constitutionalism in particular.[92] This is taken to be entailed by the principle of *determinatio* itself: 'the precise allocation of law-interpreting power between courts and other public bodies is itself a question for determination at the constitutional level'.[93] That is only the beginning of the story, as we have also examined, since there are exceptions to this general rule, albeit imprecisely defined. But Vermeule goes further, extending *determinatio* to include agnosticism on the importance of 'democracy vis-à-vis judicial review',[94] the question on which the debate between legal and political constitutionalism often pivots, even if more commonly framed around the importance of legislative supremacy vis-à-vis constitutional review.

Whether constitutional *determinatio* can carry such a large burden is doubtful. But what do natural law principles tell us about the importance of democracy as a political practice, or about ensuring a representative legislature? Nothing at all, it transpires, at least on Vermeule's account. Ambivalence on these questions is due to their subordinate nature, 'the crucial point is that the common good need not justify itself before the bar of democracy, but the reverse: democracy, like any other regime form, is valuable only insofar as it contributes to the common good, and not otherwise.'[95]

To say that democracy is good or bad only depending on the ends to which it is put is to say that democracy has no intrinsic value at all, and Vermeule is at least forthright about this: 'Democracy – in the modern sense of mass electoral democracy – has no special privilege'.[96] Neither do representative legislatures have any particular value as law-making bodies, beyond merely prudential considerations.[97] There is a candidness here that is as refreshing as it is alarming, in an age where democracy is so often extolled without any reflection. But it is not

[92] CGC, 10.
[93] CGC, 12.
[94] CGC, 19.
[95] CGC, 48.
[96] CGC, 47.
[97] CGC, 48.

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merely democracy in the modern electoral sense that is dismissed, since there is no other formulation of democracy that is examined or offered.

We can now see why 'Dworkin plus deference' bears so little weight. Although it might imply that democratic legitimacy, via a principle of political representation, has some intrinsic value, it turns out that deference in Vermeule's scheme has nothing to do with respecting the dignity of legislation or the virtue of democracy. It turns entirely on the second-order value of settlement and stability. Were it shown to be the case that an authoritarian form of government could better be instrumentalised to achieve this, and the common good itself, democracy would presumably serve no further purpose.

If natural law principles under-determine the proper institutional balance of powers, we learn elsewhere that common good constitutionalism in the US will favour a government structure characterised by a 'powerful presidency ruling over a powerful bureaucracy'.[98] Is this due to sheer fact and historical circumstance? Finnis has long argued that there is a presumptive authority enjoyed by those with the sheer capacity to coordinate and resolve disputes.[99] 'Might does not make right' as such, but does entail a defeasible assumption of making right. Is this a surprising claim? In the natural law tradition, as continued here by Vermeule, the importance of *de facto* authority overshadows any claim to democratic or legitimate authority. For the natural lawyer, as for Vermeule, authority *per se* is both 'natural and legitimate'.[100] Neither of these loaded terms is explained. But in this way, questions about the *type* of political authority or regime are brushed aside; they have no bearing on issues of legitimate constitutional design or constitutional change.

Key to Vermeule's stipulation for authority is the casual aside that political authorities 'usually will' act purposively to attain the common good through reasonable determinations of principles of natural law.[101] This continues a crucial line in the classical tradition, shared by Finnis, who articulates it in more detail using the notion of 'central' or 'focal' case. But if public authority is just that power which happens to have *de facto* charge of the community, surely scepticism of its legitimacy is a pretty sound starting point. This is where political modernity, including the liberal tradition, has had a profound influence on our political and philosophical thought. Vermeule simply dismisses scepticism of authority as positivist cowardice, underpinned by a horror of judgment.[102]

But there are traditions which are sceptical of appeals to natural authority less from any positivist horror of judgment than from strong beliefs in secularism,

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[98] Vermeule, in *The Atlantic*, above.
[99] Finnis, *Natural Law and Natural Rights*, above, 246-247.
[100] CGC, 7.
[101] Not always, but 'usually'. Vermeule thinks this point is denied by 'certain strands of the liberal tradition'.
[102] See also CGC, 70, rejecting Holmes's scepticism. At the same time, Holmes is simply dismissed as a positivist (CGC, 70).

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plurality, equality, emancipation and so on.[103] They may be built on a democratic ethos and strong sense of 'the public' sphere; or they may insist on political action and a virtuous and engaged citizenry; or they may be based on the autonomy of the political realm and the generation of authority through relational power and prudential judgement.[104] This type of political constitutional theory also finds positivism lacking, as it lacks any account of the construction of modern governmental authority. Authority is simply presumed. But from this perspective, Dworkin's fictional reconstruction of law coupled with a moral reading of the constitution is equally deficient, conflating legality with moral legitimacy and occluding the political relationship between rulers and ruled that lies at the core of constitutional law and practice.[105]

It is not merely a curious irony that liberalism's crown jurist has been subverted for an arch-conservative end. There is in fact a symmetry that bears out the theoretical borrowing. Postwar liberalism, on both sides of the Atlantic, turned away from the domain of the political and the belief in a vibrant democracy and adopted the moralistic tones that would pervade first the cold war and now the culture wars of the last decades. In this sense, common good constitutionalism is again the mirror image of its declared enemy. Whereas liberalism turns to apparently transcendental values, the 'holy trinity' of liberal democracy, human rights and the rule of law, conservatism turns to authoritarianism, the common good, and executive power. Both leave political authority behind. And because of their own dismissal of popular sovereignty and democratic politics, liberals are hamstrung from offering a compelling critique of the authoritarian movements of the new right.[106]

Vermeule brushes over the detail of the argument for authority, and simply defines the common good as 'the flourishing of a well-ordered political community'.[107] What constitutes flourishing? What makes a political community well-ordered, or even just ordered, in the first place? What keeps it in such a condition? These, presumably, are matters of political theory and Vermeule makes the explicit disclaimer that his is not a book of political theory.[108] Yet the book is littered with claims that can only be properly addressed as matters of political theory, from the attacks on modernism to the rejection of liberal individualism, from the critique of individual rights to the justification for executive power. These are framed as questions of legal theory, and answerable on the basis of a version of natural law, but one can only accept that *if* one accepts some version of natural law. And even then, the relationship between natural law and modern legal and political

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[103] One of which Vermeule himself cites, namely the tradition that emerges out of Dewey's radical democracy.
[104] See e.g. Martin Loughlin, *Foundations of Public Law* (OUP, 2010).
[105] See Martin Loughlin, 'Political Jurisprudence' in Michael A. Wilkinson and Michael W. Dowdle (eds), *Questioning the Foundations of Public Law* (Hart, 2018).
[106] See Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP, 2021).
[107] CGC, 7.
[108] CGC, 5.

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philosophy would need to be scrutinised rather than simply presumed to result in the victory of natural law. But Vermeule also tells us that he has nothing original to say about jurisprudential ideas.[109]

A CONSERVATIVE REVOLUTION?

How then should *Common Good Constitutionalism* be approached? Sitting between jurisprudence and constitutional theory it lacks the analytical precision of the former and the contextual richness of the latter. Although there are aspects which speak to matters of administrative law when confined to the jurisdictional features of the US constitution, there is no engagement with constitutional theory outside a very narrow range of US scholarship.[110] The author is aware of this lack of scholarly attention and explains it away for reasons of pressing public importance.[111] The stakes are too high and too urgent to be left to the process of rigorous academic debate. But this leaves us to consider its strengths as a book of public advocacy for a particularly conservative constitutional position.

According to Conor Casey, one of Vermeule's associates, their joint endeavour aims to sever the link between cultural conservatism and economic neoliberalism and thereby rescue conservatism itself.[112] Casey describes a powerful 'post-liberal' bloc in the US, benefitting from widespread discontent with the mainstream consensus in both Republican and Democratic Parties and the decades of neoliberal globalisation they have supported. This new bloc is 'united in a shared view that conservative politics must abandon its commitment to economic libertarianism, and become more open to using state power to promote an affirmative vision of the common good and secure the socio-economic conditions respectful of it.'[113]

Is this claim to sever conservatism from economic libertarianism merely opportunistic, seizing on a moment of deep and widespread discontent with the vast inequalities in American society (and replicated elsewhere)? The fact that no claims against economic libertarianism or neoliberalism are developed in *Common Good*

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[109] CGC, 4.

[110] If the lack of engagement with continental European scholarship might be more excusable, Vermeule claims the whole enterprise to be based on European sources. There is no engagement at all with figures such as Alan Brudner, whose liberal communitarian vision of constitutional goods would appear to be quite similar in important respects, or Martin Loughlin, with whom Vermeule shares a rejection of positivism but whose notion of political jurisprudence looks to prudential as opposed to moral reason. Vermeule very briefly addresses a 'regnative prudence' (CGC, 9), which manages to do without the language of morality and appears briefly again (CGC, 161) but only in relation to the issue of subsidiarity.

[111] CGC, 25. In some respects, the light touch is a casualty of a North American academic style in writing monographs, the flipside of its law review articles overburdened by citations.

[112] See Conor Casey, 'Common Good Constitutionalism and the New Battle over Constitutional Interpretation in the United States' (2021) 4 *Public Law* 765.

[113] Casey, ibid, 770.

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Constitutionalism suggests it might well be. How should state power be used to secure the socio-economic conditions for the common good? Does Vermeule think that neoliberalism is to be overcome by judicial fiat? That 'abundance' will be delivered by executive power?

Common Good Constitutionalism is said to be a work of interpretation 'written from the lawyer's point of view'.[114] This is a lawyer with a mission, to restore the promise of a classical tradition that sees law as an 'ordinance of reason', and to break with the false gods of liberalism. But then this is a lawyer who is also to preach deference, not for the sake of democracy but for the sake of stability. Can this less-than-Herculean figure, 'Dworkin plus deference', get American jurisprudence back to the right path, overturning what Vermeule himself describes as nearly a century of mistaken constitutionalism plus decades of jurisprudential error? Isn't this, after all, a Herculean task?

Dworkinian interpretivism is based on a deeper claim about the nature of law, namely that law is subject to theoretical disagreement through and through; it is not based on the exceptional situation or restricted to 'hard cases'.[115] This is at the core of Dworkin's objection to positivism. Vermeule's constitutional theory, in keeping with his Schmittian inspiration, takes a very different form, based on norm and exception. This is notably extended beyond the judicial role and into the justification for extensive and unbound executive power, under the apparently harmless-sounding principle of subsidiarity.[116] It is towards unbound executive power that 'Hercules' must defer. Dworkin's mistake, it transpires, was not only his theory of 'rights as trumps'; it was to put 'Hercules' into the wrong institutional role.

A clue as to the book's intention is offered at the end of the introduction: the audience is not the lawyer as such, 'but the intelligent observer of the law… who intuits that something has gone very wrong with our law and our legal academy, but isn't sure exactly how or why.'[117] Seizing on this moment of deep crisis, another clue comes with the motto for the project, Vermeule offering the injunction *imperare aude* 'dare to command!'[118]

The flipside of dare to command is, presumably, 'deign to obey'. But who is to command? And who to obey? Liberal critics of *Common Good Constitutionalism* have predictably picked up on what they consider is Vermeule's illiberal authoritarianism.[119] He himself has described the project as 'illiberal legalism'.[120] Neither epithet gets to the heart of its revolutionary ambition.

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[114] CGC, 5.
[115] See Ronald Dworkin, 'Hart's Postscript: The Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1-37.
[116] CGC, 160-161.
[117] CGC, 25.
[118] CGC, 71.
[119] See e.g. James Chappel, 'Nudging Towards Theocracy: Adrian Vermeule's War on Liberalism', Spring 2020, *Dissent Magazine*, available here: https://www.dissentmagazine.org/article/nudging-towards-theocracy (last accessed 16 October 2022).
[120] Vermeule, in *The Atlantic*, above.

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Originalism, Vermeule notes in passing, although now too 'defensive', has often been profoundly disruptive and even revolutionary when viewed against the background of the existing constitutional principles. It should not therefore be confused with Burkean conservatism.[121] But Vermeule's own project requires some sort of rupture from the status quo, if not a revolution. If the modernist, progressive and liberal project has gone so terribly wrong, and mistakes have been piled up over years of constitutional malpractice, it hardly seems plausible that this can be put right by a few Supreme Court cases or administrative decisions. And the purpose of the book is to make an intervention into US constitutional politics at what Vermeule perceives to be a critical moment in time, perhaps a moment of 'intergenerational exception', when constitutional culture has reached a nadir of liberal declension and is waiting for salvation.

Does the appearance of this book, and the accolades it has received,[122] indicate the extent of liberal decline? If so, what comes next? Commenting on the prophecies of conservative jurist Clarence Thomas, Corey Robin notes that under 'Thomas's aegis, the Court now assumes a society of extraordinary violence and minimal liberty, with no hope of the state being able to provide security to its citizens.'[123] In the failed state that America has become, with the extent of violence, insecurity and polarisation that pervades its society, claims of systemic danger and state incapacity become plausible. In these conditions, Robin laments, 'it's no wonder that an increasing portion of the population, across all races, genders, and beliefs, have determined that the best way to protect themselves, and their families, is by getting a gun'.[124]

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[121] CGC, 93.

[122] According to the book's blurbs: 'an instant classic' (Sohrab Ahmari); 'the most important book of American constitutional theory in many decades' (Jack Goldsmith); 'the most important and original book on constitutional theory for this generation' (Patrick Deneen).

[123] Corey Robin, 'The Self-Fulfilling Prophecies of Clarence Thomas' July 20, 2022, *The New Yorker*, available here: https://www.newyorker.com/news/daily-comment/the-self-fulfilling-prophecies-of-clarence-thomas (last accessed 16 October 2022).

[124] Ibid.

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